SUPREME COURT OF THE UNITED STATES.

No. 227.

HORACE H. DAY, PLAINTIFF IN ERROR,

VS.

W. JAMES WOODWORTH AND AL.

IN ERROR TO THE CIRCUIT COURT, UNITED STATES, FOR THE DISTRICT OF MASSACHUSETTS.

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[Gunton, Print.]

UNITED STATES, *ss.*

The President of the United States, to the judges of the circuit court, holden in and for the district of Massachusetts, greeting:

[SEAL.]

Because that, in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Horace H. Day, of the city, county, and State of New York, and a citizen of that State, plaintiff, and W. James Woodworth and als., citizens of the State of Massachusetts, defendants, in a plea of trespass, a manifest error has intervened to the great damage of the said Horace H. Day, as in his complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, esq., chief justice of the said Supreme Court at Washington aforesaid, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and fifty, and of the independence of the United States the seventy-fifth.

ISAAC O. BARNES, *Clerk.*

Allowed by P. SPRAGUE,
Judge of the U. S., for the district of Massachusetts.

UNITED STATES OF AMERICA,
Massachusetts district.

At a circuit court of the United States, begun and holden at Boston, for the first circuit and district of Massachusetts, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and fifty.

Before the honorable Levi Woodbury, associate justice; honorable Peleg Sprague, district judge.

HORACE H. DAY, of the city, county, and State of New York, and a citizen of that State, plaintiff,

vs

W. JAMES WOODWORTH, Miller Turner, William W. Pynchon, Robert L. Fuller, Andrew Sisson, Harvey Clemence, Thomas Bolton, Merret Bristol, Joseph Bowen, Andrew Elmandorf, Seth G. Pope, Edward Gorham, Ephraim C. Brett, Arnold Turner, Marcus Toby, George J. Kipp, John B. Bump, ——— Atthouse, Erastus Brown, Erastus F. Russell, John C. Russell, Asa C. Russell, Edward P. Woodworth, Loring G. Robbins, Lorenzo H. Rice, and Mark Rossiter, of Great Barrington, in Berkshire county, in the State of Massachusetts, and each of whom is a citizen of the said State, defendants.

In a plea of trespass for that the said defendants on the thirteenth day of July, in the year eighteen hundred and forty-eight, with force and arms broke and entered the plaintiff's close, situate within the town of Great Barrington, county of Berkshire, and district aforesaid, and then and there cut, tore, pulled down, razed, demolished, and destroyed a certain dam belonging to the plaintiff.

And also for that the said defendants on the fourteenth day of July, eighteen hundred and forty-eight, with force and arms broke and entered another close of the plaintiff, situate within the town of Great Barrington, county of Berkshire, and district aforesaid, and then and there cut, tore, pulled down, razed, demolished, and destroyed a certain other dam belonging to the plaintiff; and other wrongs the said defendants then and there did, against our peace, and to the damage of the said plaintiff (as he says) the sum of seven thousand dollars.

This action was entered at the October term of this court, A. D. 1848, when the parties appeared, and thence the same was continued unto the last term, and from that term the same was continued by agreement unto the October term, A. D. 1849.

And now the said defendants come and defend, &c., when, &c., and for plea say, that as to the force and arms, and whatever is against the peace, they are not guilty, and thereof put themselves on the country. And as to the breaking and entering the close in the said first count mentioned, and the cutting, tearing, and pulling down, razing, demolishing, and destroying the dam of the plaintiff, in the said first count mentioned; and as to the breaking and entering the said close in the said last count mentioned, in the said declaration, and the cutting and tearing, pulling down, razing, demolishing, and destroying the same in said last count mentioned; and the said defendants say, that the plaintiff his action aforesaid thereof against them ought not to have or maintain, because they say, that the said close in the said first count of the said declaration mentioned, and the said close in the said last count of the said declaration mentioned, now are, and at the

several times when, &c., were one and the same close, and not other or different closes; and the said breaking and entering in said first count mentioned, and the cutting, tearing, pulling down, razing, demolishing, and destroying the dam in said first count mentioned, and the breaking and entering in said last count mentioned, and the cutting, tearing, pulling down, razing, demolishing, and destroying the dam in said last count mentioned, are one and the same breaking and entering, cutting, tearing, pulling down, razing, demolishing, and destroying, committed at one time, and not other or different. And the defendants further say, that at the time when the said trespasses are alleged to have been committed, and for a long time previously thereto, and prior to, and at the time of the erection of the said plaintiff's said dam, certain mills and a certain mill dam, the property of, and in the use and possession of the Berkshire Woollen Company, (a corporation duly established by the laws of the State of Massachusetts,) had been and were then lawfully erected and maintained, by, upon, and across said stream on which plaintiff's dam was built; that while said mills and dam were thus erected and maintained, and used by said corporation, the plaintiff unlawfully caused to be erected in said stream, and below said dam, and at the time of said alleged trespass, unlawfully caused to be maintained therein the said dam in his declaration mentioned, in such manner as to injure the said mills and dam of the said corporation; that the defendants, by direction of said Berkshire Woollen Company, and as their agents and servants, did enter upon the said plaintiff's close, and did break down and demolish said plaintiff's dam, in the manner least injurious to said dam; that they broke down and demolished no more of said dam than was necessary to remove or relieve the injury to said company's mills and dam caused by the maintenance of said plaintiff's said dam as aforesaid, and that said defendants did not break and enter the plaintiff's close any further or otherwise, nor thereupon use more force or violence, than were reasonably necessary to relieve the injury aforesaid. All which acts the defendants might lawfully do, and which are the same trespasses as to the breaking and entering the plaintiff's close, and pulling down and destroying his said dam, in the introductory part of this plea mentioned, and this they are ready to verify. Wherefore, they pray judgment, if the plaintiff his action aforesaid against them ought to have and maintain, and for their costs.

By their attorney

WM. WHITING.

And as to the matter whereof the said defendants put themselves on the country, the said plaintiff doth the like, by

B. R. CURTIS, *his Atty.*

And as to the said plea of the said defendants by them first above pleaded, the said plaintiff says, that he ought not to be barred from having and maintaining his aforesaid action thereof against them; because he says, that although true it is that at the said time when, &c.,

the said Berkshire Woollen Company were then the owners and possessed of the said mills and dam in the said plea mentioned, and although true it is that the said mills and dam were upon and across the same stream on which the said plaintiff's dam then was, and although true it was that the said defendants committed the said trespasses by command of the said corporation, for replication nevertheless in this behalf, the said plaintiff says, that the said defendants of their own wrong and without the residue of the cause in their said plea alleged, broke and entered the close of the said plaintiff, and tore down and destroyed the said dam, and committed the said trespasses in the introductory part of the said plea mentioned, in manner and form as the said plaintiff hath above complained, and this he prays may be inquired of by the country. Wherefore he prays judgment and for his costs.

By B. R. CURTIS, Esq., *his Atty.*

And the defendants do the like.

By WM. WHITING, Esq., *their Atty.*

Issue being thus joined, the cause, after a full hearing, is committed to a jury, sworn, according to law, to try the same, who, after hearing all matters and things concerning the same, return their verdict therein upon oath, say: In the above entitled cause the jury find that the reduction of the said dam of the said plaintiff, to the extent of three inches for its entire length, was justified; but that the further reduction was not justified; and so the jury find that the said defendants, of their own wrong, and without the residue of the cause by the said defendants in their said first plea alleged, committed the trespasses in the said plea mentioned, in manner and form as the said plaintiff hath, in his said declaration, complained; and thereof assess damages in the sum of two hundred dollars.

ROBERT ORR, *Foreman.*

Then said cause was thence continued to the present term of this court.

And now it is considered by the court that the said Horace H. Day recover against the said W. James Woodworth, Miller Turner, William W. Pynchorn, Robert L. Fuller, Andrew Sisson, Harvey Clemence, Thomas Bolton, Merret Bristol, Joseph Bowen, Andrew Elmendorf, Seth G. Pope, Edward Gorham, Ephraim C. Brett, Arnold Turner, Marcus Toby, George J. Kipp, John B. Bump, ——— Atthouse, Erastus Brown, Erastus F. Russell, John C. Russell, Asa C. Russell, Edward P. Woodworth, Loring G. Robbins, Lorenzo H. Rice, and Mark Rossiter, the sum of two hundred dollars damages, without costs.

At the trial of said case, the plaintiff, by his attorney, excepted to the instructions to the jury of his honor the presiding judge, and filed the following bill of exceptions, which are allowed viz:

U. S. circuit court, Mass. district, October term, 1849.

DAY
vs.
WOODWORTH et als.

This is an action of trespass for breaking and entering the plaintiff's close and tearing down his mill-dam. The defendants justified under an alleged right to enter, &c., because the dam was a nuisance to mills above, on the same stream, belonging to the Berkshire Woollen Company, whose servants the defendants were, and that by the command of the said company the defendants entered and took down so much and no more of the said dam as was necessary to relieve the mills above.

At the trial the defendants claimed the right to begin and offer their evidence first, and open and close the argument. The plaintiff claimed the same right. The presiding judge ruled in favor of the defendants, and the plaintiff's counsel excepted to the ruling. The presiding judge instructed the jury in his first summing up, that the defendants had a right, by law, to enter the plaintiff's close, and to take down so much of the plaintiff's dam as was necessary to relieve the mills above from all practical injury occasioned by that dam; but that, if the defendants had taken down more of the dam than was necessary for that end, or if none was necessary to be taken down for that end, the jury must find for the plaintiff.

That if the jury should find for the plaintiff on the last ground, viz., that the plaintiff's dam caused no injury to the mills above, the plaintiff was entitled to a complete indemnity, and the jury would allow in damages the cost of restoring so much of the dam as was taken down, and compensation for necessary delay of plaintiff's mill; and they might also allow such sum for the expenses of prosecuting the action, over and above the taxable costs, as they should find the plaintiff had necessarily incurred for counsel fees and the pay of engineers in making surveys, &c. But if the jury should find for the plaintiff on the first ground, viz., in that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not any thing for counsel fees or extra compensation to engineers.

The plaintiff's counsel requested the court to instruct the jury that they might allow counsel fees, &c., if there was any excess in taking down more of the dam than was justifiable, and gave as a reason that the defendants thereby became trespassers ab initio. The presiding judge instructed the jury as above set forth on this point.

After being charged by the presiding judge, the jury retired and subsequently came into court for instructions, preferring a written request, as follows:

U. S. C. C. Jury Room, Dec. 8, 1849.

To his honor Judge Sprague:

If the jury find that the plaintiff's dam was too high and ought to be reduced, but not to the extent of the reduction by the defendants, can the jury find a verdict to that effect for the plaintiff according to law; if so, can they find damages for the excess of such reduction?

R. ORR, *Foreman.*

Thereupon the presiding judge gave anew the instructions above set forth, except that he instructed them not to allow any thing for counsel fees, &c., if they should find that the reduction of the dam to any extent was justifiable. The jury again retired, and subsequently returned into court with a written paper, in the words following:

U. S. C. C. Jury Room, Dec. 8, 1849.

In the case of H. H. Day against Woodworth et al., the jury find that the reduction of the plaintiff's dam to the effect of three inches for its entire length justifiable. The jury further find that the defendants pay to the plaintiff the sum of one thousand dollars in full for such excess of reduction and delay.

ROBERT ORR, *Foreman.*

The plaintiff asked to have a verdict presented to the foreman for his signature following the words of the issue. The presiding judge stated that he was not prepared to say to the jury that that would be the same in substance as their finding, and ruled that the verdict, to be presented to the foreman for his signature, should also set forth that part of the finding that the plaintiff's dam was lawfully reduced to the effect of three inches throughout its entire length. There was no evidence that the defendants had reduced the plaintiff's dam through its entire length, but it appeared that the plaintiff's dam was one hundred and twelve feet long, and that the part cut down by the defendants was the most westerly part, about fifty-four feet in length, and that this fifty-four feet was cut down about inches, and that this would have the effect of reducing the obstruction, presented by the dam, more than three inches for its entire length.

To the above rulings of the presiding judge the plaintiff excepted.

In this stage of the proceedings, the defendants' counsel desired of the presiding judge to inquire of the jury whether something for counsel fees was not included in the sum of one thousand dollars mentioned in said finding of the jury.

The presiding judge being of opinion that there was no evidence which would warrant the jury in finding damages to the amount of one thousand dollars for the said excess of reducing the dam, without expressing this opinion, made the inquiry requested, to which the foreman answered, that they did not allow any thing for counsel fees, but only for the excess and delay, as appeared by the written verdict. The de-

fendants' counsel then urged that the written verdict said that the sum of one thousand dollars was to be in full, and requested the presiding judge to ask the jury if they did not allow that sum in the expectation that the plaintiff was to recover no more. The foreman of the jury responded in substance as before; but one of his fellows said he understood the plaintiff was to recover no more, and that each party was to pay his own costs, and that he had agreed to the verdict on that understanding. This understanding was denied by another of the jury, and the presiding judge then said that it must be the verdict of each juror, and that this was not the verdict of the one who said he had agreed to it on the misunderstanding, and therefore the presiding judge proceeded to sum up anew on the subject of damages, referring to the evidence, and giving to the jury substantially the instructions, in point of law, before given, and adding that, if the plaintiff should recover $1,000 damages, he would, as the prevailing party, by law recover his taxable costs; and having so done, directed the jury again to retire; to this proceeding the plaintiff's counsel excepted. Subsequently, the jury again returned into court, and brought in a second verdict, in writing, in the words following:

"*U. S. C. C. Jury Room, Boston, December* 8, 1849.

In the case of Horace H. Day vs. Woodworth et al., the jury find that the reduction of the plaintiff's dam to the effect of three inches for its entire length was justifiable.

The jury further find, that the defendants pay to the plaintiff the sum of two hundred dollars for such excess of reduction and delay.

ROBERT ORR, *Foreman.*"

This verdict was put in the form in which it appears on the record, but before it was signed the plaintiff's counsel suggested to the presiding judge that, as the jury had been instructed that in one event the plaintiff would recover costs, some of the jury might have agreed to this verdict with that understanding, and requested that this inquiry might be made of the jury; thereupon the presiding judge inquired of the jury whether, in rendering this verdict, they had any reference to costs, and the foreman of the jury having replied that they had not, was about to sign the verdict, when one of his fellows objected, and stated that he had agreed to the verdict in the belief that, as prevailing party, the plaintiff could recover his costs; thereupon the presiding judge charged the jury a third time on the subject of damages, referring to the evidence, and repeating in substance the instructions in point of law before given; and further instructed them that the plaintiff, recovering only two hundred dollars, would not recover costs, and that it would be a violation of their oaths to have any regard to the costs, it being their duty to find the actual damage proved, and no more, and directed them again to retire; which having done, they brought in the verdict which appears of record. To all these proceedings the plaintiff excepted, and prayed that his exceptions might be allowed, and that this bill

of exceptions might be signed and sealed by his honor the judge; all of which being found true, the same is accordingly signed and sealed.

PELEG SPRAGUE, [SEAL.]
Judge of the U. S. Mass. district.

U. S. CIRCUIT COURT,
Mass. district.

I, Isaac O. Barnes, clerk of the circuit court of the United States for the first circuit, district of Massachusetts, do hereby certify, that the foregoing is a true copy of the record of the case—Day vs. Woodworth and als.

In testimony whereof I have hereunto set my hand, and affixed the seal of the said circuit court at Boston, this twenty-fifth day [SEAL.] of November, and of the independence of the United States of America the seventy-fifth.

ISAAC O. BARNES,
Clerk of U. S. circuit court.